IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§ Civil Action No. H-01-3624 § **(Consolidated)**
This Document Relates To:	§ CLASS ACTION
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	§
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. KENNETH L. LAY, et al., Defendants.	§

MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM CERTAIN BANK DEFENDANTS

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I. INTRODUCTION

This motion seeks production of discovery which the Bank Defendants have been required to, but have refused to produce, and continuing discovery by the Bank Defendants notwithstanding their latest claim for avoiding discovery.[1]

On December 20, 2002, the Court denied the Bank Defendants' motions to dismiss the Consolidated Complaint. On January 7, 2003, the Bank Defendants answered. And, in its Order dated April 24, 2003, the Court held "that the discovery stay under the PSLRA is hereby LIFTED." Order at 47. Despite the Court's Order lifting the discovery stay, and despite the fact numerous defendants and plaintiffs are now producing documents to the depository, the Bank Defendants have refused to produce any documents, and now argue the PSLRA discovery stay has been "renewed."[2]

The Bank Defendants claim their position is "consistent" with the Court's prior orders in this case. But, in its Order dated January 27, 2003, the Court stated that discovery would "go forward" upon resolution of then outstanding motions to dismiss. And the Court's Order dated April 24, 2003 could not be any clearer: the discovery stay has been lifted. While the Court has expressly contemplated that Lead Plaintiff would amend or supplement the Consolidated Complaint, the Court has not indicated the stay would be "renewed," as the Bank Defendants suggest. Such a "renewal" would be inconsistent with the PSLRA and the purpose of the PSLRA discovery stay.

Indeed, Congress never intended the PSLRA discovery stay to be abused by parties such as the Bank Defendants. Lead Plaintiff served discovery almost ***one year*** ago. The Court's Scheduling Order dated February 28, 2002 provided for such discovery so that defendants would be prepared to produce documents promptly if their motions to dismiss were denied. The Bank Defendants'

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[1] "Bank Defendants" refers to Bank of America Corp., Barclays PLC, Canadian Imperial Bank of Commerce, Citigroup, Inc., Credit Suisse First Boston Corp., J.P. Morgan Chase & Co., Lehman Brothers Holdings Inc., and Merrill Lynch & Co., Inc.

[2] The Bank Defendants' Supplemental Response, In Light of the Renewed Automatic Stay of Discovery Under the PSLRA, to Lead Plaintiff's Proposed Pretrial Scheduling Order (hereinafter "Bank Defendants' Supplemental Response") at 3. *See* 15 U.S.C. §78u-4(b)(3)(B) ("In any private action arising under this chapter, all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.").

motions to dismiss were denied more than ***six months*** ago. And the discovery stay was lifted almost ***two months ago***. However, the Bank Defendants have yet to produce a single responsive document.

The Bank Defendants' conduct is consistent with their pattern of delay tactics. For example, in Enron's bankruptcy proceeding, the Bank Defendants have moved to delay release of the examiner's next report, which will discuss involvement of the banks in the Enron fraud. But the Bank Defendants' delay tactics will not foster overall resolution of this case.

This Court recently ordered the Bank Defendants to mediation. However, if the mediation is to have the greatest chance of success, discovery must be allowed to proceed. This action cannot be resolved without revelation of the facts and an effort to make all those responsible account for their conduct in an efficient, expeditious manner.

The Bank Defendants should be compelled to produce their discovery.

II. PROCEDURAL HISTORY

On April 8, 2002, Lead Plaintiff filed its Consolidated Complaint. On May 8, 2002, the Bank Defendants moved to dismiss the Complaint. One month later, Lead Plaintiff filed its oppositions to the Bank Defendants' motions to dismiss. Pursuant to the Court's Scheduling Order and desire for this extraordinary case to be litigated as expeditiously as possible, on July 2, 2002, Lead Plaintiff served its initial document production requests on the Bank Defendants (and others).

On December 20, 2002, the Court denied the motions to dismiss of Barclays, CIBC, Citigroup and CSFB in their entirety, upheld the 1933 Act claims against Bank of America and Lehman Brothers, and conditionally denied Merrill Lynch's motion to dismiss. In denying the Bank Defendants' motions to dismiss, the Court recognized amended pleadings would be filed in this case. For example, defendant Merrill Lynch's motion to dismiss was denied on condition Lead Plaintiff supplement its Complaint with certain allegations. *In re Enron Corp. Sec.*, 235 F. Supp. 2d 549, 703 (S.D. Tex. 2002). (Lead Plaintiff filed its supplemental allegations on January 27, 2003.) Similarly, in its January 27, 2003 Order, the Court wrote, "If Lead Plaintiff does amend to assert claims against Merrill Lynch, Merrill Lynch will then have an opportunity to challenge the adequacy of that new pleading through another motion to dismiss, if it so chooses." Order at 3. While the Court anticipated a motion to dismiss from Merrill Lynch and amended pleadings from Lead Plaintiff, the

Court "reassure[d] the parties ... that it ***will permit discovery to go forward*** in *Newby* and *Tittle* as soon as the *Newby* motions to dismiss have been resolved." *Id.* (emphasis added)

Likewise, in its April 24, 2003 Order, the Court "order[ed] that Lead Plaintiff shall supplement or amend its complaint as indicated in this and prior orders and shall file a copy of the Powers Report within twenty days of entry of the order." Order at 46. And in the same decision, the Court "order[ed] that the discovery stay under the PSLRA is hereby LIFTED." *Id.* at 47.

Lead Plaintiff's proposed pretrial schedule contemplates the Bank Defendants producing documents to the depository starting on May 28, 2003. That deadline has passed. And, Lead Plaintiff's proposed pretrial scheduling order contemplates that discovery shall commence in May 2003 and continue uninterrupted to prepare the case for trial in the fall of 2005.

III. STATEMENT OF CONFERENCE

During meet and confer calls, several counsel for the Bank Defendants, when asked to provide Lead Plaintiff with a date for production of their documents, stated they were unable to do so due to their belief the Amended Complaint may implicate the PSLRA discovery stay. The Bank Defendants have now confirmed they believe discovery is stayed and are refusing to produce responsive documents at this time. *See* Bank Defendants' Supplemental Response.

IV. THE BANK DEFENDANTS NO LONGER MAY CLAIM ANY PROTECTION OF THE PSLRA'S DISCOVERY STAY

Despite the Court's Order lifting the discovery stay, the Bank Defendants contend the filing of motions to dismiss the amended complaint by new and existing defendants automatically "renews" the discovery stay until the motions to dismiss are resolved. Bank Defendants' Supplemental Response at 3. The Bank Defendants overreach.

First, the Bank Defendants' discovery was due well before they filed their motions to dismiss. Lead Plaintiff's document requests were served nearly a year ago, in accordance with the Court's Scheduling Order dated February 28, 2002. That Scheduling Order expressly provided for defendants' preparation for production of discovery during the pendency of motions to dismiss, and responding production within a reasonable time frame if motions to dismiss were denied. Indeed, well before the Court lifted the stay the Bank Defendants searched for, retrieved, and reviewed their

documents, and many of them are ready to provide their documents to the document depository vendor. Promptly after the Court lifted the stay, the Bank Defendants should have released their documents for production but they purposefully did not do so. Indeed, this was notwithstanding the fact that many of these documents have already been provided to investigators for a Senate Permanent Subcommittee and, concerning J.P. Morgan Chase, produced in other litigation. Thus, the Bank Defendants do not (and cannot) dispute that they refused to produce documents in accordance with their obligations, notwithstanding the motions to dismiss they recently filed.

Second, Lead Plaintiff's naming of additional defendants in the amended complaint does ***not*** renew the discovery stay as the Bank Defendants claim. *In re Lernout & Hauspie Sec. Litig.*, 214 F. Supp. 2d 100 (D. Mass. 2002), is instructive on this point. In *Lernout*, the plaintiffs brought securities fraud claims against several defendants, who then moved to dismiss for failure to state a claim under the PSLRA's heightened pleading requirements. *Id.* at 102-03. Like the instant case, to address the multiple motions to dismiss, the *Lernout* court divided the defendants into groups and established a schedule to hear each group's motions, beginning with the senior officers. *Id.* at 103. After extensive briefing and a hearing, the *Lernout* court denied the senior officers' motions to dismiss. *Id.* at 102. The defendants then requested an order staying all discovery – including discovery against the senior officers whose motions to dismiss had been denied – until every motion to dismiss had been resolved. *Id.* at 103-04. The *Lernout* court denied the defendants' motion to stay and ordered discovery to proceed against the senior officers whose motions to dismiss had been denied. *Id.* at 109.

The *Lernout* court reasoned that allowing discovery to proceed against the senior officers was consistent with the PSLRA's language and Congress's purpose in enacting the statute. The plaintiffs' complaint had already survived motions to dismiss, hence discovery could not be deemed a mere fishing expedition to find a sustainable claim. *Id.* at 106. Nor, explained the *Lernout* court, could discovery be used against the senior officers to force innocent parties to settle a frivolous class action. *Id.* Like *Lernout*, the Court here weighed the case against the Bank Defendants before lifting the discovery stay. *See Lernout*, 214 F. Supp. 2d at 105 ("In the instant case, this Court has denied

four motions to dismiss and has benefitted from extensive briefing and a hearing on the allegations against the four senior officers before ruling on discovery.").

Similarly, in *Carson v. Clarent Corp.*, No. C 01-03361 CRB, Order (N.D. Cal. Sept. 9, 2002) (Ex. A hereto), the district court ordered discovery even though certain individual defendants' motions to dismiss had not been resolved. Since the defendant company's and its CEO's motions to dismiss had been denied and they had answered the complaint, the court permitted discovery against them "pending resolution of the other individual defendants' motions to dismiss." Like in *Clarent*, the Bank Defendants have each filed an answer.

In their Supplemental Response, the Bank Defendants rely on *In re Imperial Credit Indus. Sec. Litig.*, 252 F. Supp. 2d 1005 (C.D. Cal. 2003), and *Hilliard v. Black*, 125 F. Supp. 2d 1071 (N.D. Fla. 2000), for the proposition the discovery stay has been renewed. These cases are distinguishable and provide no guidance here. Reference to the PSLRA's stay by the court in *Imperial Credit* is *dicta*. 252 F. Supp. 2d at 1009-10. And, *Hilliard* has been criticized because it "contains no discussion of the statutory provision, and no discussion of the stay beyond the order itself." *Lernout*, 214 F. Supp. 2d at 105 n.8. Moreover, the reasoning of the court in *Hilliard* could not apply here, where defendants have been ordered to prepare for the production of discovery during the pendency of motions to dismiss yet do not produce discovery as called for after denial of their motions.

The Bank Defendants also cite the Court's August 7, 2002 Order to support their claim that the discovery stay has been renewed. The August 7 Order was issued before the motions to dismiss were resolved and the allegations were vetted by the Court. More importantly, the Court ruled "***discovery will proceed*** on all federal securities claims surviving the PSLRA's heightened pleading standards" after the ***then-pending*** motions to dismiss were resolved. Order at 5 (emphasis added).

Absent here are the harms the PSLRA's stay provision is intended to prevent. As the Court has noted, the PSLRA's discovery stay "was designed to prevent fishing expeditions in frivolous securities lawsuits." February 27, 2002 Order at 4. *See also Lapicola v. Alternative Dual Fuels, Inc.*, No. 3-02-CV-0299-G, 2002 U.S. Dist. LEXIS 5941 (N.D. Tex. Apr. 5, 2002) (primary purposes for stay are to prevent "unreasonable" discovery burdens before "disposition" of a motion to dismiss

and to avoid situations where plaintiffs do not possess sufficient information to meet heightened pleading standard). But the Court has already found this is not a frivolous case. *See, e.g.*, March 12, 2003 Order at 92 ("From the totality of circumstances before it, this Court does not find, and would be greatly surprised if any reasonable person disagreed, that the *Newby* consolidated action is merely a strike suit filed solely for nuisance value or an inflated settlement.").

Accordingly, the filing of new motions to dismiss by the Bank Defendants, a ploy to thwart Lead Plaintiff's discovery efforts, is insufficient to renew the stay.

V. CONCLUSION

For all the reasons stated, Lead Plaintiff respectfully requests the Court grant Lead Plaintiff's motion to compel and order the Bank Defendants respond to discovery propounded forthwith.

DATED: June 23, 2003

Respectfully submitted,

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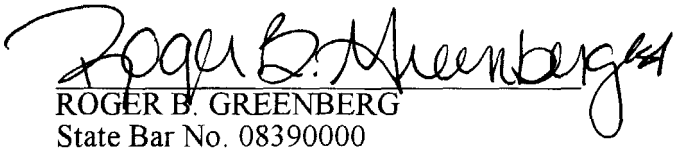

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM CERTAIN BANK DEFENDANTS has been served by sending a copy via electronic mail to serve@ESL3624.com on this 23rd day of June, 2003.

I further certify that a copy of the foregoing MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM CERTAIN BANK DEFENDANTS has been served via overnight mail on the following parties, who do not accept service by electronic mail on this 23rd day of June, 2003.

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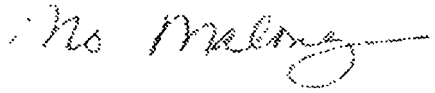

Mo Maloney

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARK CARSON,

Plaintiff,

v.

CLARENT CORPORATION, et al,

Defendant.
_____/

No. C 01-03361 CRB

ORDER

Now before the Court is lead plaintiff's ex parte motion for an order requiring defendant Clarent Corporation and non-party Ernst & Young LLP to respond to limited document requests. After carefully considering the papers submitted by the parties, including the opposition, lead plaintiff's motion is GRANTED in part. As Clarent and its Chief Executive Officer have filed answers to the complaint, there is good cause for permitting limited discovery pending resolution of the other individual defendants' motions to dismiss. Accordingly, lead plaintiff may serve requests for documents on Clarent and its auditor Ernst & Young. Any dispute as to the scope of such discovery shall be made to a Magistrate Judge.

IT IS SO ORDERED.

Dated: September 9, 2002

/s/
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

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